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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 280.

APPEAL FROM THE COURT OF CLAIMS.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
against

THE UNITED STATES.

BRIEF OF APPELLANT

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THOMAS W. GREGORY,
of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1925.

MISSOURI PACIFIC RAILROAD COMPANY, No. 280
Appellant, APPEAL FROM
against THE COURT OF
THE UNITED STATES. CLAIMS.

BRIEF OF APPELLANT.

The case below is reported in 58 Ct. Cls. 524 (Rec., pp. 17-23) and in 60 Ct. Cls. 183 (Rec., p. 16).

Judgment was entered January 19, 1925 (Rec., p. 23) and appeal allowed February 2, 1925, and the jurisdiction of this Court is invoked under Section 242 of the Judicial Code (R. S. 707) then in effect, authorizing appeals from the Court of Claims to this Court.

Statement of the Case.

This is an appeal from a judgment dismissing plaintiff's petition on demurrer. For a full statement of appellant's case reference should therefore be made to the petition (Rec., pp. 1-16). A brief statement of the nature of the case and the principal facts relied on follows.

Portions of appellant's railroad described in the petition were aided in their construction by two land grants from the United States (Act of Congress, June 10, 1852, 10 Stat. at L. 8; Act of Congress, February 9, 1853, 10 Stat. at L. 155). Each provides that the United States mail shall at all times be transported over said railroads at such prices as Congress may by law direct.*

*The text of these provisions is as follows:
Act of June 10, 1852 (Section 6).

That the United States mail shall at all times be transported on said railroads under the direction of the Post Office Department at such price as Congress may by law direct.

Act of February 5, 1853 (Section 6).

That the United States mail shall at all times be transported on said road and branches under the direction of the Post Office Department at such price as Congress may by law direct.

This is an action to recover compensation for services on appellant's land grant routes withheld by the Post Office Department through the alleged erroneous application of land grant rates as fixed by Congress to services to which appellant claims inapplicable. Prior to the Act of Congress of July 28, 1916¹, (39 Stat. at L. 425, Sec. 5) mail was transported for the Post Office Department under contract, except as carried by land grant roads under the obligations imposed by such land grants. By that Act it was made the duty of all railroads to transport the mails and perform all other services in the Act described to the extent, in the manner and on the trains designated by the Postmaster General. Each day's refusal to perform the service prescribed at the rates provided by the Act was made a separate offense for which a fine of \$1000 was imposed². There is, therefore, absent from this case that element of voluntary acquiescence in rates known to have been fixed by Congress or covered by postal rules and regulations which has been present in some other cases arising prior to said Act.

The Act of July 28, 1916 imposes upon all railroad companies two major obligations: first the duty to transport the mails and second, the duty to furnish railway post office cars for the "distribution" of mails en route as hereinafter described and to transport without additional charge the postal clerks working therein. Railway post office cars are thus described in the petition:

"Railway post office cars are cars constructed in accordance with plans and specifications made or approved by the Post Office Department which, in addition to space provided for the transportation of the mails, contain space occupied by letter cases, tables, racks and other fixtures, hereinafter collectively called 'distributing facilities' which are provided in said cars solely for the purpose of open-

¹This act was passed as Section 5 of the Post Office appropriation bill for the fiscal year ending June 30, 1917 and is reproduced in the Appendix. Because of its length we have separately numbered its paragraphs, for convenience in reference, although there is no such numbering in the original.

²Appendix, p. viii, ¶ 42.

ing of pouches and sacks and distributing their contents and other classes of mail by the agents and employees of the Post Office Department, through the means of the facilities described and according to destination, into appropriate containers for transportation and delivery and are used for said purposes, the said service thus performed being hereinafter described as 'distribution', and the space in said cars occupied by distributing facilities together with that furnished and necessary for the use of said agents and employees of the Post Office Department in making said distribution, being hereinafter referred to as 'distribution space'." (Record, pp. 6-7.)

It is this distributing space in such cars to which this case relates and the furnishing of which the appellant claims is not within the terms of its land grants. The history, origin and use of such cars and of the distributing space therein, the nature of the services performed therein and the relation of the same to the administration of the postal service and to railway transportation service are fully set forth in the petition, the allegations of which for the purpose of this case are to be taken as true.

The administration of the postal service requires first, suitable provision for the receipt of mail matter from the public; second, its assemblage, sorting and distribution into pouches, sacks or other appropriate containers for transportation and in preparation therefor technically known as "distribution" and hereinafter so referred to; third, its transportation; and fourth, its final delivery to addressee. The requirements of the service are also such that redistribution is frequently required between point of receipt and delivery (Petition, Rec. p. 3). By Act of July 7, 1838 (5 Stat. at L. 283) each and every railroad then or thereafter completed was declared to be a post road and the Postmaster General was directed to cause the mail to be transported thereon. For many years after railroads were made post roads and became mail carriers all distribution and redistribution was made in post offices and at

the time of the making of appellant's land grants train distribution and the use of railway post office cars for such purpose were unknown and no such cars were in use or in existence on any railroad in the United States. Thereafter the Post Office Department inaugurated a system whereby a portion of said distribution or redistribution should be made by employees of the Post Office Department in railway post office cars (Petition, Rec. p. 3). Distribution wherever performed is performed exclusively by postal agents and employees, is similar in character and performance, and the extent to which it is performed in stationary post offices or in railway post offices is governed entirely by the distributing policy of the Department and only incidentally by the volume of mail carried (Petition, Rec. pp. 4, 8).

The space occupied by distributing facilities is physically separate from that in which the mail is transported (Petition, Rec. p. 9). Neither the distributing facilities nor any part of the distributing space in railway post office cars is required for the purpose of transporting the mail and is not provided as an aid thereto but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution (Petition, Rec. p. 10). Mails not requiring distribution on trains are carried in ordinary baggage cars, their total volume exceeding that carried in railway post office cars. By reason of the large proportion of the space in railway post office cars taken up by the distributing fixtures and facilities only one-third as much mail can be carried in such cars as in ordinary baggage cars. Space and expense are thus increased threefold by their use (Petition, Rec. pp. 9 and 10).

Where railway post office cars are furnished and train distribution performed, railroads, in addition to furnishing and hauling the extra space required, are also required,

without additional charge, to transport the postal agents and employes engaged in the service of distribution, of whom there are sometimes as many as six or seven in a single car (Petition, Rec. p. 8).

Shortly after railway post office cars first came into existence, Congress by an Act of March 3d, 1873 (R. S. 4004) fixed a scale of rates based on weight and distance carried to apply to the transportation of the mail, whether in railway post office cars or in ordinary railroad equipment, and in addition provided for the payment of specified amounts per mile per annum for the use of railway post office cars 40 feet in length or over, graduated according to the length of such car up to a maximum of 60 feet. The scheme of rates then established thus consisted in part of payments for the transportation of the mails irrespective of the type of equipment used, and in part of payments for the facilities furnished in railway post office cars for distribution and may be properly described as a combination weight and space basis. By an act of Congress of July 12, 1876 (19 Stat. at L. 80, 82) it was provided that all railroads which had been aided in their construction by land grants requiring them to transport mails at such prices as might be fixed by Congress should receive but 80 per centum of the compensation accruing to other railroads under the rates of pay authorized by Congress for such other carriers. At that time and down to the passage of the Act of July 28, 1916, railway mail service was performed by all railroads except land grant roads under express or implied contract and there was no statutory obligation upon the part of any railroad other than land grant roads to perform such services. From and after the effective date of the Act of July 12, 1876, the appellant and all other land grant roads received in accordance with said Act but 80 per centum of the rates authorized for payment to other railroads for the transportation of the mails; but, for all services performed in furnishing railway post office cars from the effective date of said Act to November 1, 1916, received the same compensation

accruing to other railroads for the performance of a like service (Petition, Rec. pp. 4-6), although literally construed such land grant roads were entitled under said Act to but 80 per centum of such compensation. That is to say, during all of this period, the defendant recognized that the furnishing of distributing facilities represented a separate and distinct service, not included within the appellant's land grant obligation, but performed by it voluntarily, under express or implied contract, as a service outside of such obligation and for which it was entitled to the same compensation received by other than land grant railroads for the same kind of services similarly performed.

The Act of 1916, in addition to substituting compulsory for voluntary service, made a change in the manner in which pay to be received by railroads for services performed at the instance of the Post Office Department should be determined. The Act of 1916, after declaring that reasonable compensation should be made for all service required by it, directed the Interstate Commerce Commission to fix reasonable rates of pay and method of payment, either by weight, space, both or otherwise as it might determine. It also authorized the Postmaster General, pending decision by the Commission, to inaugurate a space system of pay at rates, temporarily fixed in the Act, on such mail routes as might be selected by the Postmaster General with the approval of the Interstate Commerce Commission, but subject to readjustment at rates and method of pay thereafter fixed by the Commission.¹

Appellant's mail routes were thus duly placed upon the space basis on November 1, 1916. On December 23, 1919, the Commission handed down its decision (*Railway Mail Pay*, 56 I. C. C. 1) continuing the space basis in effect but at rates substantially higher than the temporary rates named in the Act.² The rates so fixed by the

¹ Appendix p. v, ¶30.

² For rates named in statute see Appendix p. i, ¶8; for rates fixed by Commission see petition Rec. p. 19.

Commission were found by it to be just and reasonable for all railway common carriers in the United States including appellant. The Act also continued the 80 per cent. basis for land grant routes. Between July 28, 1916, when the compulsory service features of the Act became effective, and November 1, 1916, when the appellant's mail routes were placed upon the space basis, the appellant continued to receive the same compensation allowed to other carriers for the furnishing of railway post office cars, at the same time receiving but 80 per centum of the weight rates then in effect for the transportation of the mails. With the establishment of the space basis, the Postmaster General for the first time applied the 80 per centum basis to all services performed over the appellant's land grant routes without distinction as between space provided for transportation and that devoted to distribution, and continued so to do during the whole period covered by the petition. The appellant duly and seasonably protested the application of the 80 per centum basis to compensation accruing from the furnishing of such distributing space and demanded that it receive for such service the same compensation accruing to other carriers (Petition, Rec. pp. 12 and 13).

The Act of 1916 prescribed the service to be performed in terms of railway car service or space. Mails not to be "distributed" en route were to be carried in ordinary baggage cars, and mails to be "distributed" in railway post office cars. The service to be performed in such cars was defined in the Act as "full railway post office car service" or "apartment post office car service", according to whether a full car or a mail apartment in a combination car were to be used. Apartment car service was in turn divided into service in 30 foot apartment cars and 15 foot apartment cars. Full car service and apartment car service are hereinafter collectively referred to as railway post office car service. Railway post office car service, as prescribed in the Act, whether in full cars or

apartments, included both the duty to transport the mails and to furnish the necessary facilities and space in such cars for distribution.

The Act did not itself fix the amount of space in railway post office cars to be devoted to distributing facilities or the nature and extent of the fixtures to be installed therein, nor did it empower the Commission to do so. These were left wholly within the jurisdiction of the Postmaster General. Under these circumstances the space rates, named in the Act itself and as afterwards established by the Commission for railway post office car service, were named to cover the entire service performed in such cars, without division as between space devoted to the transportation of the mails and that devoted to distribution. No specific rates were therefore established to apply to distributing space. The Act neither made provision for a physical division of the space as between the requirements of transportation and distribution, or for a division of the pay between such services. It left the first to the Post Office Department and fixed a rate to cover all services performed in the car. The rates for railway post office car service as for all classes of service, however, were based on the space used, and were fixed at so much per mile of service performed.

The petition alleges that between November 1, 1916 and December 31, 1923 appellant performed 3,438,350 miles of service in full railway post office cars over its land grant routes, 2,082,936 miles of service in 30 foot apartment cars, and 1,089,158 miles of service in 15 foot railway apartment cars; that all of such service was furnished under the authority and at the demand of the Postmaster General and under compulsion of the Act of 1916; that not less than 60% of the space furnished and hauled in railway post office cars, not less than 56 $\frac{2}{3}$ % of the space in 30 foot apartment cars, and not less than 46 $\frac{2}{3}$ % in 15 foot apartment cars consisted of distributing space furnished and hauled solely for the purpose of dis-

tribution and used therefor; that none of such space was required for the purpose of transporting the mails, or would have been required except for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution; that the extent of the service, in addition to that of transportation, thus required of and furnished by the appellant is represented and measured by the proportion which such distribution space is of the total space in such cars; that on account of such services it is entitled under the Act of 1916 to corresponding proportions of the compensation accruing for the service in such cars at the rates fixed therefor, which is likewise declared to be the fair and reasonable value of the service thus performed in such cars in the furnishing and hauling of distributing space and facilities therein; that it has been paid but 80 per cent. thereof and is entitled to recover the remaining 20 per cent. or the sum of \$189,880.54 (Petition, Rec. pp. 9, 10, 13, 14).

Since these services were performed under compulsion, the appellant also seeks to recover the equivalent of interest at 6 per cent. per annum on said amount from its various dates of accrual under authority of *Seaboard Air Line v. U. S.*, 261 U. S. 299.

ARGUMENT

SUMMARY OF ARGUMENT.

I. That the furnishing of distributing space is not within the Appellant's land grant obligation follows from the ordinary and usual meaning of the words employed therein and from a consideration of the nature and purpose of the service itself.

II. The Act of 1916 both in its text and in its legislative history recognizes the distinction between transpor-

tation and distribution and imposes upon railroads the duty to furnish distributing space and facilities as a duty in addition to the duty to transport.

III. Under forty years of contemporaneous construction preceding the Act of 1916 the furnishing of distributing space was not considered by either party to be within the terms of Appellant's land grant contract.

IV. The furnishing of distributing space and facilities cannot be drawn within appellant's land grant contract upon the ground of changed conditions or of convenience and necessity, and Congress is without authority to require the same as an additional service at less than just and reasonable compensation.

V. The fact that a negligible quantity of mails, successively undergoing distribution, is carried in the distributing space, cannot deprive the appellant of its right to reasonable compensation for such space, none of which is necessary for transportation or would be required except for the performance of such distribution by departmental agents in such cars.

VI. The Act of 1916, if fairly susceptible of a construction which will avoid the grave constitutional question involved in the application of land grant rates to distributing space, must be given such other construction.

VII. The Act of 1916 properly construed does not make land grant rates applicable to distributing space.

VIII. For the furnishing of distributing space Appellant is entitled to that proportion of the compensation for Railway Post Office car service at the rates fixed by the Commission, which the distributing space in such cars is of the total space therein, however the Act of 1916 be construed.

I.

That the furnishing of distributing space is not within the Appellant's land grant obligation follows from the ordinary and usual meaning of the words employed therein and from a consideration of the nature and purpose of the service itself.

Unless the services in question are within the obligation created by the appellant's land grant Congress may not require their performance at less than reasonable compensation. The extent of this contractual obligation therefore underlies all other questions in this case.

Webster's International Dictionary defines "transport" thus:

"To carry or convey from one place or station to another; to transfer; as to *transport* goods; to *transport* troops."

Such was the duty undertaken by the appellant under its land grant, viz.: to "carry" or "convey" the mails from one place or station to another.

To that duty has now been added the duty to furnish a specially equipped car, unadaptable for use in any other service that it performs, plans and specifications for which are wholly within the control of the Post Office Department, and which is fitted up with tables, racks and other fixtures similar to those to be found in ordinary post offices for the purpose of enabling the Post Office Department to utilize the time while mails are being transported to empty the contents of sacks and other containers in which individual pieces of mail matter are contained, and redistribute them in other sacks or containers in aid of their final delivery.

As alleged in the petition and pointed out in the statement the postal service involves the performance of four distinct functions, receipt, distribution (meaning thereby in the technical language of the postal laws and regulations not a distribution through carriage and delivery but a separation or distribution of individual pieces of mail matter into appropriate containers for transportation and delivery), transportation and final delivery. Of these transportation alone is the function of the railroad. Each of the other three is admittedly a function of the Post Office Department and carried on by postal agents wherever performed. The distribution performed in these cars is as much dissociated with transportation itself as is the packing of goods for shipment by freight or express. It is not contended that the duty to transport includes the duty to distribute on trains. This service remains a function of the Post Office Department and does not change its complexion according to the place of performance. It being no part of the duty of the railroad to perform distribution service, how can it be contended that the furnishing of the facilities therefor is a part of the duty to transport? So far as the function itself is concerned it is not only performed exclusively by the agents of the postal service but employees of the railroad company are prohibited from entering the cars and the work itself requires such expert and detailed knowledge of mail routes, post offices, etc., as to be incapable of performance by any other than the agents of the department. A large part of the mail distributed in the space furnished goes to points beyond the lines of the appellant's railroad and a considerable part is distributed on its trains for the purpose of making up pouches for letter carriers in important cities both on and off appellant's railroad in order that when the mail reaches such city it may be taken possession of by the individual postman whose duty it is to deliver it from house to house without requiring further sorting at

the post office (Petition, Rec. p. 8). Certainly this is a service entirely foreign to the carriage of mail by the railroad from station to station.

Not the least of the additional duties imposed by reason of train distribution and the furnishing of distributing facilities therefor is the duty to carry postal agents engaged in this work, numbering sometimes six or seven to the car, and to whom the carrier has assumed all of the obligations of a common carrier of passengers for hire, and whom, it is made the duty of railroads to carry without additional compensation. Without the carriage of these postal agents the distributing facilities would be useless and they are not, of course, authorized except on trains to which such postal clerks are assigned. Clearly the duty to carry such clerks can by no stretch of the imagination be regarded as within the duty to transport mails, yet the space in question is furnished solely for the purpose of providing a place within which such clerks may carry on an administrative function of the Post Office Department. According to the Annual Report of the Postmaster General for the fiscal year ended June 30, 1923, there were 18,784 railway postal clerks and 1,399 acting railway postal clerks so carried by the railroads and for whose use this distributing space and these distributing facilities were furnished (*Annual Report of Postmaster General*, 1923, p. 39). The whole purpose is not to provide a transportation facility but space in which these postal clerks may operate a post office, so much so that the Postmaster General has himself aptly described these railway post office cars as "traveling post offices" (*Report of Postmaster General, supra*, p. 38). It appears from the same report that there were 16,666,218,045 distributions and redistributions of mail matter made in these traveling post offices during that year (*Annual Report of the Postmaster General*, 1923, pp. 39-40). The space to which this case relates was a part of the space provided for the distribution of this enormous amount of mail matter by postal clerks working on trains, and none

of which, according to the allegations of the petition, was required or would have been necessary, for the transportation of the mails themselves.

That the duty to furnish such space represents an added and different duty from that embodied in the appellant's contractual duty to carry may be well illustrated by comparing the service performed in these cars with the service performed in the carriage of mail in ordinary baggage cars. A railway post office car consists of two parts, the distributing space wherein the distributing facilities are provided, and storage space wherein mail is carried, the two being physically separate from each other. In a standard 60 foot full railway post office car 36 feet are devoted to distributing space, 16.4 feet to storage space and 7.8 to doorways. Sixty per cent. of the space in the car is therefore devoted and provided solely for distribution. As already noted in the statement, by reason of the performance of distribution in railway post office cars it takes three railway post office cars to carry the same load that may be carried in one ordinary baggage car, wherein mail is carried without distribution and in which type of equipment a larger volume of mail in the aggregate is carried than in railway post office cars (Petition, Rec. pp. 9 and 10). Assuming, for illustration, that the entire volume of mail matter carried over one of the appellant's land grant routes could be *carried* in a single ordinary baggage car, but that, for administrative efficiency in the handling of mails the Post Office Department desires to have all of such mail *distributed* on appellant's trains running on said route, it appears that, in order to meet this requirement of the Department, the railroad company would be required to operate three railway post office cars and in addition thereto to carry therein such number of postal clerks as might be determined by the Postmaster General and assume toward such clerks the obligations of a common carrier of passengers for hire. It would seem plain that the carriage of such mails in one baggage car, or distributed

among as many baggage cars and on as many trains as the Post Office Department might desire, would be a complete compliance with the appellant's obligation to "carry" or "convey" the mails from one place or station to another, and that the additional duty of furnishing three cars instead of one, in order to permit train distribution, represents not only an added duty but one of a totally different kind and character, viz.: the furnishing of a traveling post office for the performance of an administrative function of the Post Office Department.

This illustration also disposes of any argument that might be made that the furnishing of distributing space and facilities is only incidental to the transportation of the mails. It is a separate and distinct service, and, in so far as mails carried in railway post office cars are concerned, their transportation may be more properly regarded as incidental to their distribution.

As pointed out in the statement the extent to which such distribution and redistribution is carried on in railway post office cars depends entirely upon the distributing policy of the department, changes from time to time with changes in such policy and is affected only incidentally by the volume of mail carried. This is illustrated by the fact that, as alleged in the petition, after train distribution had been in effect for a considerable number of years the department established what are known as terminal post offices, (post offices at or near railway stations and at railway centers where mail is distributed for further transportation) and transferred to such terminal post offices a large part of the work formerly done in railway post office cars. During the period covered by the service involved in this case there were approximately 47 such terminal railway post offices wherein the service performed is in all respects similar to that performed in railway post office cars (Petition, Rec. p. 6). At the present time therefore distribution is carried on in part in ordinary post offices, in part in railway post offices and in part in terminal railway post

offices. Wherever it is done the service is the same and the facilities are the same and the extent to which it is done in one place or another is determined by the Post Office Department. It will hardly be contended that, by reason of the establishment of these terminal railway post offices as a substitute for railway post office cars, the land grant obligation of the appellant now includes the duty to furnish station space at less than reasonable compensation for such railway terminal post offices; yet the service performed therein and the occasion therefor, namely, the necessity for redistribution en route between origin and final destination are precisely the same. As to this see *Missouri Pacific Ry. Co. v. U. S.*, 55 Ct. Cls. 38, 485, wherein it was held that a railroad company could not be required to furnish space at stations for the "distribution" of registered mails under a contract to provide suitable and sufficient room for "handling and storing" the mails, and from which the Government took no appeal.

At the time that appellant's land grants were made train distribution and the use of railway post office cars were unknown. Railway post office cars first came into use a short time prior to 1873 (*Preliminary Report and Hearings of the Joint Committee on Postage and Second Class Mail Matter, etc.*, 1914, p. 39), twenty years after appellant's land grants were made. The use of such cars and of train distribution were unknown at the time of these grants. It cannot therefore be said to have been within the contemplation of the parties at the time. Its nature, purpose and origin all indicate that it is a service separate and distinct from that involved in a simple obligation to transport the mails, which was the only obligation the appellant undertook in accepting the land grant made to it. That Congress may impose such additional obligation upon the appellant and all other railroads by law we do not deny. But appellant's obligation to perform services at any rate fixed by Congress

must be limited to the performance of the duties required by its land grants. For any and all other duties it is entitled to reasonable and just compensation.

It would be a mere play on words to hold that because this distributing space is itself transported over the appellant's road the service thus performed is within its obligation to transport the mails without regard to the purpose for which such space is furnished or the use to which it is put. That the purpose and not the place of performance determines the legal status of the service rendered is clear both upon principle and authority, and has been applied by this Court on a number of occasions as applicable to the law of transportation. Thus it has been held that, although a contract for carriage of goods be begun and ended within a single state and therefore, if judged by the place of performance, beyond the power of the National Government to regulate under the commerce clause, it is nevertheless subject to the provisions of the Interstate Commerce act if the purpose is to transport goods definitely intended for further transportation in interstate or foreign commerce (*T. & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Comm. of Louisiana v. T. & P. Ry. Co.*, 229 U. S. 336; *Ohio Railroad Comm. v. Worthington*, 225 U. S. 101). It has also been held that where a service embraced within the transportation duties of a carrier is performed by a shipper at its own place of business it nevertheless remains a transportation service for which the shipper is entitled to be paid by the railroad (*Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42). On the other hand, where service is performed by a railroad in a railroad car which is in reality in the nature of preparation for transportation, it is not transportation itself, even though a necessary step to its performance; and thus a shipper has the right to perform such service at his own place of business, as distinguished from the exclusive right of the railroad to per-

form all services actually embraced within transportation. Here, as in that case, the service is one of preparation for transportation and cannot become a part of transportation, merely because it is performed in a railway car (*U. S. v. A. T. & S. F. Ry. Co.*, 232 U. S. 199).

II.

The Act of 1916 both in its text and in its legislative history recognizes the distinction between transportation and distribution and imposes upon railroads the duty to furnish distributing space and facilities as a duty in addition to the duty to transport.

The Act of 1916 begins by classifying the several services, the performance of which the Postmaster General is authorized to require into full "Railway Post Office Car Mail Service", "Apartment Railway Post Office Car Service", "Storage Car Mail Service" and "Closed Pouch Mail Service". Storage mail service is defined as "service by cars used for the *storage and carriage* of mails in transit other than by full and apartment railway post office cars." Closed pouch mail service is defined as "the *transportation and handling* by railroad employees of mails on trains on which full or apartment railway post office cars are not authorized." Storage and closed pouch service take place in ordinary baggage cars and involve the performance of an ordinary transportation service. Full railway post office car service and apartment railway post office car service are each defined as service by cars or apartments "constructed, fitted up and maintained for the *distribution* of mails on trains".¹ In another part of the act it is made the specific duty of all railroads "to *transport* such mail

¹Appendix p. i, §§2-7.

matter as may be offered for transportation by the United States".² The act further provides:

"Railroad companies carrying the mails * * * shall furnish all cars or parts of cars used in the transportation and distribution of the mails * * * and place them in stations before departure of trains at such times and when required to do so."³

The act further provides:

"If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper."⁴

The act on its face thus distinguishes between the duty to transport and the duty to provide space and facilities for distribution, and in express terms imposes the latter as an additional duty. This precision of language was not accidental. Each of the technical expressions used had a well defined meaning in post office nomenclature and was understandably and advisedly so used by Congress. The act had been preceded by a succession of Congressional investigations, the last of which was that of a joint committee headed by Senator Bourne and commonly known as the Bourne Commission, which rendered a preliminary report in 1914 hereinafter referred to as the Bourne Commission report (*Railway Mail Pay, Preliminary Report and Hearings of the Joint Committee on Postage of Second Class Mail Matter and Compensation for the Transportation of the Mail, 1914*). This commission recommended the establishment of a space basis of pay and the act of

²Appendix p. vi, ¶31.

³Appendix p. iv, ¶17.

⁴Appendix p. iv, ¶18.

1916 was in reality merely the culmination of the work of that committee, with which Congress was fully familiar. On page 22 of this Bourne Commission report appears a letter written March 21, 1910, by the Postmaster General to the Chairman of the Committee on Post Offices and Post Roads, in which these cars are described as "practically traveling post offices". On page 39 of the same report appears the following extract from a report of another Joint Commission made in 1901:

"RAILWAY POST-OFFICE CARS"

"Until a comparatively short time prior to 1873 the distribution of the mails in transit was unknown. Prior to the late sixties the railroads simply transported the mails, which were delivered at the post offices and there distributed. Accordingly, 'weight' as the basis of compensation, was at the time of its adoption, and long thereafter, entirely adequate.

For a few years, however, prior to 1873 the distribution of the mails in transit had been practiced to a sufficient extent to satisfy the Post Office Department and Congress that it was a desirable innovation and a branch of the Postal service that should be very much enlarged; but it was recognized that *if the railroads were not only to transport the mail itself but also to supply, equip, and haul post offices for the distribution of the mails*, the compensation upon weight basis that had obtained up to that time was not entirely adequate and just, and therefore the law of 1873, as already indicated, contained a provision allowing additional compensation for railway post office cars. At first these cars were mostly not exceeding 40 or 45 feet in length and of light construction similar to baggage and express cars." (Italics ours.)

On July 25, 1913, the Postmaster General transmitted to the Bourne Commission a letter from Mr. Joseph Stewart, then Second Assistant Postmaster General (*Railway Mail*

Pay, Preliminary Report, etc., supra, pp. 745-7) from which the following is an extract:

"Car space—For closed pouch service and storage mail the Post Office Department requires only the space which is necessary *for the proper transportation of the same*. *For the distribution of mails enroute* it requires a car or apartment in a car specially fitted for the same. This latter requirement is provided for by law. When the needs of the service require 40 feet or more linear space in the car the law permits payment for the space in addition to the payment for the transportation of the mails." (Italics ours.)

This letter then goes on to point out that the plans and specifications for such cars are wholly within the control of the Post Office Department, that postal clerks are carried therein without additional charge, that such railway post office cars are required to be placed in terminals for distribution purposes in advance of departure for the convenience of the Post Office Department in the expeditious handling of its work. All of these requirements, then rules of the Post Office Department, were carried into the existing statute. The foregoing provisions of the act classifying the service and defining the duties of the railroads originated in a bill recommended for passage by the Postmaster General, in explanation of which Mr. Stewart, then Second Assistant Postmaster General, appeared before the Senate Committee. In the course of his exposition of the technical terminology employed and of the requirements of the proposed bill Mr. Stewart carefully distinguished between the requirements of railway post office and apartment car service on the one hand and of storage and closed pouch service on the other and repeated over and over again that but a small fraction of the space in railway post office and apartment cars was needed for the transportation of the mails but was required solely for its distribution, and

that such distributing space was never authorized or paid for except to the extent required for distribution.*

The act of 1916 effected two changes in the governing law, each of which was equally important. First, it made the performance of the service compulsory instead of contractual and, second, provided for a change in the basis of pay. Under the old contract system railroads performed many services, some of which were provided for in the postal laws and others in the postal regulations, all of which became a part of the obligation of the carrier when a contract was made, but the obligation of which rested upon the contract and not upon any provision of law. In changing from carriage by contract to carriage by compulsion it was therefore essential that it should be made the duty of the railroads to perform all those services essential to the postal administration, which had previously been performed by contract; otherwise the whole postal service would have been demoralized and the rights and obligations of the Government and the railroads respectively would have been rendered uncertain. Congress acted with full knowledge of all the facts and the language to be found in

(*) Among other things Mr. Stewart said:

*** "I want to submit to you gentlemen the official plans and specifications of these working cars (showing diagram of postal cars). Here is the plan for a 60-foot car, and it shows the amount of space which is used for the different purposes of distribution in the center of the car, and the amount of space at each end of the car in which the mails can be stored. There are 22½ feet of linear space on both sides of the car for storage of mails, as against 120 feet the whole length of the car, 60 feet on each side. Now, the assumption that you can put 20 tons of mail in that car is absurd—the absurdity of it must be apparent to you when you see the plan of the car. No such mail can be loaded in a car of that kind. That car, if a full 60-foot car, carries on the average about 2.8 tons of mail in this storage part. Little more can be carried because it must all be distributed in the other part of the car. It must be distributed in this space (indicating), and you can not devote to storage mails any greater part of the 60-foot car on account of the necessity for space in which to distribute it."

*** It is largely through carriage. Now here is a view showing the men at work in a car like that, and you can see what this part of the car looks like (showing view of postal car); and at this end up here is the only place where mail can be stored.

The next unit is the 30-foot unit, and there is a floor plan of the 30-foot car. This shows 12 feet of linear space considering both sides of the car—in 60 feet, linear feet of space, on both sides of the car. Now, that 12 feet on both sides of the car (6 feet on each side) is the only space in which mail can be stored, because all the mail put in there must be distributed in the remaining space.

the statute was used advisedly and for the purpose of bringing within the compulsory duties of the railroad all those services then being furnished by contract. In thus defining the compulsory duties of the railroads the statute employs the technical term "distribution" in four places. First, in its definition of railway post office cars; second, in the obligation to furnish cars used in "transportation and distribution"; third, in the obligation to provide space and rooms for "distribution of registered mail in transit"; and fourth, in providing that "if any railroad company *carrying* the mails shall fail or refuse to provide cars or apartments in cars for distribution * * * or to construct, fit up, maintain, heat, light, and clean such cars * * * it shall be fined such reasonable sum, etc." The term distribution is employed in every case in precisely the same sense and in the sense in which we have been using it. Those railroad companies, whose duty it is to furnish cars in the distribu-

* * * Here is the plan for the 15-foot unit (showing). This shows still less favorably for loading the car. There are 4 linear feet of space considering both sides in 30 feet, both sides of the car, which is used for mail service. You see how impossible it is to load up those cars in any such manner as has been represented to you, with 10 tons or 20 tons, or any material *pro rata* a part of that weight (pp. 61-2).

* * * Storage-car mails are mails that are put up in closed pouches and sacks, placed in the baggage car, or the storage car, which is furnished especially by the railroad to the department, which has no furniture or fittings for distribution.

Senator Hardwick: A whole carload of closed mail sacks?

Mr. Stewart: Yes, sir; it is carried through to a certain point.

* * * Mr. Stewart, Yes. Let us first consider the 60-foot car. In all this service, where the car is fitted up as a working post office, a large per cent. of the space in the car must be reserved for the handling and distribution of the mails. In the 60-foot car only 18 per cent. of the floor space can be devoted to storing mails. All the rest of the car must be used by the men distributing the mails. Now, where can 10 tons or 20 tons be loaded in such a car? It is impossible. As a matter of fact, we are now carrying in these cars about the maximum load, because if we were not we would cut down the space. We never pay the railroad company for a 60-foot car unless we need the space to carry and distribute the mails in; and if we were carrying too small a load on the average in these cars we would reduce the space. Now, take the 30-foot car (showing plan of car). Only 20 per cent. of the space in that car can be devoted to loading mails, and that is only 12 feet out of 60 feet of the whole car—both sides of the car. Where can the load claimed by the railroads be placed? The space for it can not be found. Such loading is impracticable under a practical operation of the service. Let us take the 15-foot unit. Only 13 per cent. of the floor space in that car can be used for storing mails. All the rest of it must be reserved for the distribution of the mails by the clerks." (Hearing of Senate Committee on Post Offices and Post Roads on Post Office Appropriation bill for 1917, pp. 61-2, 69-70.)

tion of the mails, to provide station space for distribution of registered mail, and upon which fines may be imposed for failing to provide cars for distribution are defined as railroad companies "carrying the mails", thus again distinguishing between the duty to carry and the duty to furnish distributing facilities. The care with which Congress made it the duty to furnish distributing facilities and space for all mail, which the department might elect to distribute on trains and for registered mail in transit at stations, shows plainly that Congress recognized that the furnishing of such space and facilities constituted an additional service which would not be embraced in the imposition of a duty to transport.

If the act had made it the duty of railroad companies to furnish all facilities and men employed in the transportation of the mails no one would contend that this included the duty to provide men to distribute mail on trains. Yet men are as necessary for this purpose as facilities and space, while neither are necessary for transportation. When Congress made it the duty of all railroads carrying the mails to furnish cars to be used for their distribution as well and provided for the imposition of penalties in the event of failure so to do, it clearly recognized that it was requiring the performance of a service in addition to and not necessary for transportation itself.

III.

Under forty years of contemporaneous construction preceding the Act of 1916 the furnishing of distributing space was not considered by either party to be within the terms of Appellant's land grant contract.

Claimant's grants were made in 1852 and 1853 while, as heretofore stated the use of railway post office cars did not begin until a short time prior to 1873. Very soon thereafter (*Railway Mail Pay Preliminary Report, etc.*,

supra), the Postmaster General was authorized by act of March 3, 1873 (R. S. 4004) "to readjust the compensation" to railroads at a scale of rates for the transportation of the mails according to weight and distance carried and with additional pay for railway post office cars 40 feet in length or over. Under this act payment to land grant roads was the same as to other carriers. By an act of July 12, 1876, (19 Stat. at L. 80, 82) the Postmaster General was again authorized to "readjust compensation" by reducing by 10 per cent. the weight rates established by the Act of 1873, but making no mention of the additional allowances for railway post offices, which therefore stood as fixed by the act of 1873. Section 13 of the Act of 1876 further provided as follows:

"Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only *eighty percentum of the compensation authorized by this act.*"

This act of 1876 constituted the only authority of the Postmaster General to make any payments to the railroads for either service and "the compensation authorized" to carriers other than land grant carriers was 90 per cent. of the weight rates provided in the act of 1873 and 100 per cent. of the additional allowances for furnishing railway post office cars for the purpose of distribution. Although the same act provided that land grant roads should receive but 80 per cent. of the compensation thus authorized for others, the Postmaster General applied the 80 per cent. basis only to the weight rates paid for the transportation of the mails and allowed to land grant roads the full additional compensation provided in the act for the use of railway post office cars at 100 per cent. of the rates paid to other than land grant roads for said service. This provision for payment to land grant carriers remained in effect without change until the act of 1916 and was then reenacted

as a part of that act. During all of this time land grant deductions were applied only to compensation made for the transportation of the mails on the weight basis and the appellant and all other land grant railroads were allowed full pay for the additional service performed in the furnishing of railway post office cars for distribution, until the space system of pay was established under the act of July 1916 in November of that year (Petition, Rec. 6). Literally construed the 80 per cent. basis established by the Act of 1876 applied to all compensation authorized, including allowance for the use of Railway Post Office cars. On the other hand Congress could not of course require any land grant road to perform any service not included within its land grant obligation at less than reasonable compensation. The limitation of the application of this eighty per cent. basis to the weight rates paid for mail transportation, and the payment of full compensation for the furnishing of Railway Post Office cars for distribution, for a period of forty years, is therefore explainable only upon the theory that the furnishing of such cars for the purpose of providing distribution space and facilities was not embraced within the land grant obligation to transport the mails, but represented a service in addition thereto. That is to say for forty years the Government construed the appellant's land grant as not including the duty to furnish such space and facilities. Even after the Act of 1916 became effective, in its compulsory service feature, the Department continued to pay full compensation for railway post office car allowances until the space basis of pay was inaugurated in November 1916.

It is our contention that the terms of the land grant are not ambiguous, but that the word "transport" is susceptible of only that definition which comports with its ordinarily accepted meaning and that resort to extraneous aid in interpretation is therefore inadmissible. If, however, a statute is susceptible of more than one construction and has received a contemporaneous construction by the Government, such construction will be followed by the courts

(*U. S. v. Alabama Great Southern R. R. Co.*, 142 U. S. 615; *Edward's Lessee v. Darby*, 12 Wheat. 206; *U. S. v. State Bank of North Carolina*, 6 Peters 29; *U. S. v. Macdaniel*, 7 Peters 1; *Brown v. U. S.*, 113 U. S. 568; *U. S. v. Moore*, 95 U. S. 760).

Section 13 of the act of July 12, 1876, quoted above, provided for the application of land grant rates to railroad companies "whose railroad was constructed in whole or in part by a land grant made by Congress". *U. S. v. Alabama Great Southern R.R. Co.*, *supra*, was a case involving application of this provision to a railroad, a part of whose line was aided in construction by such a grant and the remainder of whose line was not. The question was whether land grant rates applied to the entire railroad or only to the part thus aided. It appears in the statement of the case by the Court that the latter was the construction given to the act by the Postmaster General and by the accounting officers of the Treasury at the time that the act was passed and that the railroad company and its predecessors were paid full rates on non-aided portions from 1876 to 1885 by six Postmasters General, when in the latter year the then Postmaster General reversed the rulings of his predecessors and held land grant deductions to be applicable to the entire line. The Court held that the contemporaneous construction which had thus been given to the act was decisive of the case, saying:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit."

Here the contemporaneous construction relied upon has been continuous for 40 years and likewise consorts with the equities of the case, the changed construction now followed

involving a new departure in the attempted application of land grant rates to services admittedly not necessary to transport the mails and greatly enlarging the duties and expenses of railroad companies beyond those involved in its mere transportation.

It cannot be doubted that under such circumstances neither of two parties to a private contract would be permitted to enforce against the other an interpretation so at variance with its long continued contemporaneous construction. It will hardly be contended that if in 1852 appellant had made a contract with an express company to transport its express matter at such rates as might from time to time be fixed by a Board of Arbitration, had continued so to do until 1873, when, in addition to transporting such express matter, it also provided facilities in its cars for the redistribution and packing of such matter in containers or sacks suitable for the conduct of the express company's business and carried the additional men required for the service, for which additional service additional payment was made until 1916, the express company could be heard to say in that year that the contract rates covered both services. Yet that is precisely what is attempted to be said here.

It may be said that these arguments are weakened because during the 40 years in question, while full pay was made for railway post office cars 40 feet in length or longer, no pay was made for apartment cars of less length. This, however, was true both as to land grant and non-land grant roads and merely means that neither insisted upon its right to additional compensation for a part of the distributing facilities furnished. The performance of this service being voluntary on the part of both land grant and other companies the carriers could of course waive any additional payment to the extent deemed expedient, and this both land grant and non-land grant carriers did. The thing of importance is that to the extent that allowances for such additional service were made to anybody they were made at full rates to all notwithstanding the

fact that under the mail acts land grant carriers were to receive but 80 per cent. of the rates of compensation applying to others. By continuous observance of this practice for 40 years the Government has irretrievably committed itself to that rational interpretation of land grant obligations which comports with the ordinary meaning of the words employed therein.

IV.

The furnishing of distributing space and facilities cannot be drawn within appellant's land grant contract upon the ground of changed conditions or of convenience and necessity, and Congress is without authority to require the same as an additional service at less than just and reasonable compensation.

Appellant's land grants constitute a contract (*Burke v. Southern Pacific R. R. Company*, 234 U. S. 669) which cannot be enlarged by any act of Congress or of the Executive Departments. (*Chicago & Northwestern Ry. Co. v. U. S.*, 104 U. S. 680; *Lake Superior & Mississippi R. R. Co. v. U. S.*, 93 U. S. 442.)

Congress may impose duties other than those named in the contract but not as a part of it or at the rates fixed for contract duties. It is our contention that the Act of 1916 properly construed does not undertake to enlarge the appellant's land grant obligation by requiring it to perform such additional service at less than reasonable compensation. But if it does, then such undertaking is clearly beyond the constitutional authority of Congress. (*Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *Seaboard Air Line v. U. S.*, 261 U. S. 299; *Van Horne v. Dorrance*, 2 Dallas 304; *Pumpelly v. Green Bay Company*, 13 Wallace 166; *Charles River Bridge Co. v. Warren*, 11 Peters 420; *Minnesota Rate Cases*, 230 U. S. 352). However the

Act of 1916 is to be construed we are therefore thrown back for the determination of this case upon the interpretation to be placed upon appellant's land grant.

The words of the land grant acts themselves are to be construed in their ordinary and popular sense (*Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669 (679), *Lake Superior & Mississippi R. R. Co. v. U. S.*, 93 U. S. 442). Neither by judicial interpretation nor legislative enactment may the duties thereby imposed be extended upon the ground of changed conditions, or of convenience and necessity, to services beyond those fairly within the meaning of the words employed or within the contemplation of the parties. (*Lake Superior & Mississippi R. R. Co. v. U. S.*, *supra*.)

This case involved the interpretation of a land grant to the State of Minnesota to aid in the construction of the plaintiff's road, containing the following provision:

"and the said railroad shall be, and remain, a public highway for the use of the Government of the United States, free from all toll or other charge for (upon) the transportation of any property or troops of the United States."

This act was passed in 1864. The Army appropriation bill of 1874 prohibited payment to any railroad company for transportation of property or troops over land grant lines on condition that the Government should have free use of same, but provided for suits in the Court of Claims in behalf of such railroads. It appears that prior to the passage of this act of 1874 the Government had interpreted similar provisions in other acts as limiting the right of the Government to the free use of the railway but not to free transportation in the trains of the operating company. This question had become of practical importance at the beginning of the Civil War, and it was then ruled by the Secretary of War that while no toll should be taken for the use of the tracks, allowances should be made for equipment, motive power and other services, an opinion

subsequently confirmed by the Attorney General in 1872. From date of enactment until the passage of the Army Appropriation Act in 1874 the Government acted upon this construction. The Court, reviewing the early history of railroads and likewise referring to the interpretation placed upon the act by the War Department, held that the obligation was not to transport free but to furnish a highway for transportation free and that the company was entitled to additional compensation for equipment or other services rendered. In the course of the opinion the Court says (pp. 454-455) :

"The objection that it would be inconvenient for Government to provide locomotives and cars for the performance of its transportation cannot be properly urged. The Government can do what it always has done, without experiencing any difficulty — employ the services of the railroad and transportation companies which have provided these accommodations. It might be very convenient for the Government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable.

Equally untenable is the idea, that, because railways are not ordinarily used as public highways, therefore the appellation of 'public highways', when given to them, must mean something different from what it has ever meant before, and must embrace the rolling stock with which they are operated and used. Such a method of interpretation would set us all at sea, and would invest the courts with the power of making contracts, instead of the parties to them."

As already pointed out, these land grants antedate train distribution by nearly twenty years. The fact that train distribution is now commonly practised and may be convenient, or even necessary to the administration of the postal service, cannot make the furnishing of facilities therefor and the carriage of the men engaged therein a

part of the contract then entered into. This is not a case in which the Government is seeking the application of modern transportation methods, commonly practised for all, to the transportation services performed for the Government. It is seeking to draw within an obligation to "transport" the property, carried as the mails, a duty to provide space and facilities for the conduct of the Government's own business and to transport men as well as mails for such purpose. The service sought to be included under the duty to "transport" is not within the ordinary meaning of the word employed, or within any definition of transportation to be found in any statute, including the mail acts themselves. It has neither counterpart nor analogy in any service rendered to any other patron in the performance of transportation duties. The space and facilities in question are not necessary for the purpose of transporting the mails and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution. The men carried in such cars are not carried to assist in the transportation of the mails but to perform this administrative function there instead of having it done in ordinary post offices. Unless the ordinary and popular meaning of the words employed is to be entirely disregarded, the performance of such service would fall outside the land grant obligation of the carrier even though train distribution had been in use at the time the grants were made. This suggestion is supported by the practical interpretation placed upon this and similar land grants, irrespective of their dates, for a period of forty years. It is also supported by the care with which Congress by the Act of 1916 imposed upon all railroad companies the duty to provide this service as a duty in addition to that involved in the transportation of the mails, and at a time when railway post office cars and train distribution had been in common use on all railroads for many years.

However this may be, such service was unknown at the time of appellant's grants and therefore could not have been within the contemplation of the parties. Congress may, as it has, impose upon all railroads, including land grant railroads, the duty to provide such distributing space and facilities as a duty in addition to the duty to transport, but only at reasonable compensation, and for the performance of such additional service land grant roads are entitled to the same reasonable compensation paid to others.

In *Hollerbach v. United States*, 233 U. S. 165 (171) the Court said:

"A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. * * *"

Thus interpreted, it is plain that the services in question are not within the appellant's land grant and cannot be drawn thereunder upon the ground of changed conditions or of governmental convenience.

In *U. S. v. Stage Co.*, 199 U. S. 414, it was held that the same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the government and individuals. In that case the Stage Company had agreed to carry all mails between post offices in New York City and all railway stations at a stipulated amount per annum, including all additional service which might be required during the life of the contract beyond that then being performed, and, among other things specifically agreed to perform all such additional service, if any, which might be due to a change in the location of post offices or stations. Shortly after the Stage Company entered upon the performance of the contract the Post Office Department changed the location of certain post offices in New York and under its terms de-

manded that the Stage Company perform the additional service required by such change, the effect of which was to increase the service nearly 100 per cent. beyond that which would have been required but for such change. The Court held that notwithstanding its agreement to perform all additional services due to change in post office location the Stage Company was entitled to recover the value of the additional services performed and the contract could not be fairly or reasonably construed as imposing upon the contractor such an extraordinary increase in the service as became necessary by such changed locations.

The doctrine of this case has been twice recently reaffirmed (*Hunt v. United States*, 257 U. S. 125; *Freund v. United States*, 260 U. S. 60, 43 Sup. Ct. Rep. 70). In the *Freund* case claimant contracted in writing to carry the mails to and from the new St. Louis Post Office, then under construction, for a period of four years beginning July 1, 1911, the Postmaster General reserving the right in the contract to increase or decrease the service required, to extend the same to any new location of post offices, and to establish service to and from like offices, landings or points not named in the contract, compensation to the contractor to be increased or decreased in the event of such changes in service at the rate per mile governing the original contract. The new post office not being ready for occupancy until sixteen months after July 1, 1911, the old post office, which was thirteen blocks from the new one, continued to be used. Under duress of threatened suit on his bond the contractor complied with the orders of the department to perform the additional service required to and from the old post office by reason of the failure to have the new one ready for occupancy on July 1, 1911, and performed services demanded at a cost of \$43,726.89, for which he was paid under the contract \$24,289.62. The service bid on required six automobiles. The restated service required 18 wagons of different

capacity exceeding several times in aggregate capacity that required for the bid on service and placed other onerous duties upon the contractor not required by the service bid on. This Court held that while the construction relied upon by the Government was permissible the service was not fairly within the contemplation of the parties, that to give to the contract this construction would be unconscionable, and that claimant was entitled to recover on *quantum meruit*. It also held that although the contractor had acquiesced in the performance of the service such acquiescence was under duress and did not deprive him of the right to reasonable compensation. In this case the claimant has performed the services under duress of fines and penalties provided by the statute for non-performance of services, which have had the effect of increasing by two or three times the volume of service and expense of conducting the same beyond those required for the mere transportation of the mails. In the *Freund* case the Government from the beginning contended that notwithstanding the increased burden of the service claimant was required by contract to perform it. In this case for 40 years the Government has acquiesced in an interpretation of the carrier's land grant contract whereby the performance of these services is excluded therefrom.

In this case, as in each of the two cases cited, the additional service in question has greatly increased the burden and expense of the contractor. This case is, however, stronger than either of those cited, because in those cases the additional service required was within the literal reading of the contract while here it is not.

On every principle, governing the interpretation of statutes and contracts, it is clear that the furnishing of such distributing space and facilities and the carriage of postal clerks therein are not within the appellant's land grant obligation, and that it may not be required to provide such service at less than reasonable compensation.

V.

The fact that a negligible quantity of mails, successively undergoing distribution, is carried in the distributing space, cannot deprive the appellant of its right to reasonable compensation for such space, none of which is necessary for transportation or would be required except for the performance of such distribution by departmental agents in such cars.

The opinion of the Court below (Rec. p. 21) refers to the report of the Commission in which it is stated that in fact "a small quantity of mail is hauled in the racks and partitions of the distributing facilities", the amount of which "cannot be ascertained because it is constantly changing as the clerks in charge distribute the mails en route". Of necessity mails which are distributed on trains are hauled in the distributing facilities while undergoing distribution. Otherwise train distribution could not be performed. An extract from the testimony of the Second Assistant Postmaster General, before the Senate Committee, explaining the operations of the bill, is set forth in the footnote at page 22 of this brief. In explaining why more mail could not be carried either in the transportation or storage space of a full post office car, or in the car as a whole, the Second Assistant is quoted in such extract as saying:

"* * * Little more can be carried because it must all be distributed in the other part of the car. It must be distributed in this space (indicating), and you can not devote to storage mails any greater part of the 60-foot car on account of the necessity for space in which to distribute it."

He then went on to say that all mail put in the storage space of an apartment car must also be distributed in the remaining space, that is, the distribution space. There is thus a constant flow of mail into and out of the distribut-

ing space as the mails carried in the storage space are successively distributed. This constant flow back and forth also necessarily limits the amount of mail that can be carried in the storage or distribution space, as compared with the amount of mail which could be carried in such space solid, if its distribution en route were not required. *The petition alleges that none of the distributing space is necessary or required for the transportation of the mails*, and this statement must be taken as true for the purposes of this case. Its truth is fully corroborated by the foregoing quotation, although such corroboration is unnecessary in a case to be determined on demurrer.

If the practice of train distribution, with its accompanying distributing space and facilities, made no substantial increase in the space and expense requirements of the carrier, its effect might be regarded as *de minimis*. Since the space and expense involved are three-fold that involved in transportation alone, and since none of the space in question is necessary or required for the transportation of the mails, the fact that a negligible quantity of mail while undergoing distribution is carried in the distributing facilities, can have no bearing upon the right of the appellant to claim compensation for the extra service, required for distribution, and which would not be required except for such purpose. The petition alleges and a description of the service and space required, on its face, show that this space is not furnished for transportation or as an aid thereto, and is not necessary therefor, but is furnished solely in order that the Department may utilize the time in transit for the performance of its administrative function of distribution through railway mail clerks carried in such cars without any added compensation. Unless substance is to be entirely disregarded, the fact that a negligible quantity of mail is thus of necessity for a short space of time both transported and distributed in the distribution space cannot operate to deprive a land grant carrier of its right to reasonable compensation for the additional service performed in furnishing such space and in transporting men therein as well as mails.

VI.

The Act of 1916, if fairly susceptible of a construction which will avoid the grave constitutional question involved in the application of land grant rates to distributing space, must be given such other construction.

That the Act of 1916, if construed as an attempt to impose upon land grant roads the duty to furnish distributing space and facilities at less than reasonable compensation, is clearly unconstitutional admits in our opinion of no doubt for the reasons already advanced. In any event the constitutional question raised is not frivolous but grave and serious. Under these circumstances a construction, if permissible, should be placed upon this Act under which the constitutional question thus raised may be avoided.

In *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, the Court said:

“A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it was unconstitutional, but also grave doubts upon that score.” (Italics ours.)

In *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, Chief Justice WHITE said:

“While the grave questions thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably

susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Com. Commission*, 211 U. S. 407."

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 422, the Court said:

"If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templar Indemnity Co. v. Jarman*, 187 U. S. 197, 205."

In *Knights Templars' & Masons' Life Ind. Co. v. Jarman*, 187 U. S. 197, 205, the Court said:

"Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred. *Endlich Statutes*, See. 178. This rule was applied by this Court in *Granada County v. Brogden*, 112 U. S. 261.

Presser v. Illinois, 116 U. S. 252, 269, and *Hooper v. California*, 155 U. S. 648, 657.

We do not wish to be understood, however, as expressing an opinion upon the constitutionality of the act of 1887, if it were applied to prior policies,

but simply as holding that, in view of the language of the act, and the doubtfulness of its constitutionality as applied to prior policies, it should only be given effect in cases of policies thereafter issued."

It is needless to review other cases cited in the above decisions, or to invoke additional authority in support of this proposition.

VII.

The Act of 1916 properly construed does not make land grant rates applicable to distributing space.

The provision in the act of 1916 fixing land grant rates at eighty per centum of the reasonable rates established by the Commission was in effect a mere reenactment of the existing practice founded upon the act of 1876. It contains two provisions relating to payment to land grant roads, one a reenactment in terms of the act of 1876 and the other a reenactment of its substance. For convenience in comparison we set out these provisions in parallel columns:

ACT OF 1876.¹ SECTION 13.

† (Reenacted in Act of 1916) That railroad companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act.

ACT OF 1916.² (New provision)

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith.

¹Appendix p. ii, § 9.

²Appendix p. vii, § 39.

As we have seen, the act of 1876 was construed for 40 years by the Post Office Department as applicable only to payments for the transportation of the mails and as inapplicable to payments made for the additional service involved in the furnishing of railway post office cars for distribution. The new provision of the act of 1916 literally construed is no more sweeping in its application to all services performed by land grant carriers than was the act of 1876. On the contrary, as will appear by reference to other provisions, it is susceptible on its face of an interpretation excluding the application of land grant rates to distributing space, of which the earlier act was on its face not susceptible. The subject matter of both acts is the same, to wit: payment to land grant carriers for services consisting in part of transporting the mails and in part of furnishing distributing facilities. Under both statutes their pay is fixed at 80 per cent. of the compensation authorized to be paid to other carriers. Under the act of 1876 the compensation thus accruing to other carriers consisted of payments for transportation at weight rates and of additional payments for distributing facilities provided through the furnishing of railway post office cars. Literally construed the 80 per cent. land grant basis was to apply to all of the compensation which would accrue but for a land grant contract and not merely to a part of it. Even assuming the direction in the act of 1916 for the payment of "80 per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith" to be broad enough to embrace all service performed, whether of such a character as to be directly connected with transportation and which partake of a transportation character or merely connected therewith in the sense of being simultaneously performed, the act of 1916 is no more all-embracing than that of 1876.

The rule that in reenacting a statute the legislature adopts its prior construction extends to those cases where

the existing act is reenacted in substance but not in identical language (*Barrett's Appeal*, 73 Conn. 288; *Grier v. State*, 103 Ga. 428; *Kelly v. Northern Trust Co.*, 190 Ill. 401; *McGann v. People*, 194 Ill. 526; *Breckenridge v. Commonwealth*, 97 Ky. 267; *Wetherbee v. Roots*, 72 Miss. 355; *State v. Cornell*, 54 Neb. 647), and to cases where the statute has received a practical construction on the part of those charged with its execution, as well as where it has been construed by the courts (*State v. Cornell, supra*; *Bloxham v. Consumers' Electric Lt. & St. R. R. Co.*, 36 Fla. 519; *Commonwealth v. Grand Central B. & L. Assn.*, 97 Ky. 325). Reading these two acts together it is clear that Congress intended no more than to preserve the existing practice based upon the use of similar language in the act of 1876. The slight change in phraseology in the new provision certainly evinces no purpose either to enlarge land grant obligations or to change the then existing relation of pay as between land grant and other roads. Thus construed the 80 per cent. basis applies as before to those services within the land grant obligation and to no others.

Indeed the fact that Congress included both of the foregoing paragraphs in the Act of 1916 is internal evidence it had no thought of enlarging the obligations of land grant carriers or making any change in their basis of pay since the Act of 1916. There is no reason to assume that either of these two provisions in the existing act means anything different from the other and if it does it is impossible to determine which one applies. Each is all-embracing, each relates to the same subject-matter. The first is a reenactment in terms of the provisions of the Act of 1876, and the second a reenactment thereof in substance as applied specifically to the rates established by the Commission.

Nor does this interpretation leave the phrase "all service by the railroads in connection therewith" *functus of-*

ficio. There are many incidental services required of railroads in connection with the transportation of the mails, and to which this expression may properly be applied without extending it to the totally distinct service of providing distribution space and facilities. The act of 1916 requires the railroads to furnish all cars necessary for the transportation of the mail, to "furnish all necessary facilities for caring for and handling them while in their custody", to "provide station space and rooms for handling, storing and transfer of mails in transit, including the separation thereof by packages for connecting lines * * * and for offices for the employes of the railway mail service engaged in such station work", to transport as mail matter at the rates provided therefor "postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service", to "transport the mails on any train designated by the Postmaster General", whereas carriers generally themselves determine on what trains property committed to them shall be carried.* Under the duty to carry, handle and care for the mails, railroad companies under postal regulations load and unload mails shipped in solid car-loads whereas other carload shipments of other property are loaded and unloaded by the shipper, and whereas in the carriage of express on the same trains this service is performed by express company employes (*Railway Mail Pay, supra*). For the most part this enumeration of duties corresponds closely to the duties embraced in the term transportation in the interstate commerce act, which, generally speaking, includes the furnishing of necessary cars, the care and handling of the property and the performance of other services necessary and incident to its transportation. All of the services enumerated above have been performed by the railroads for many years as services embraced within the weight rates paid for transportation and on which land grant rates have always been applied.

*Appendix p. iv, §§ 17, 19; p. v, §§ 27, 28.

Whether in order to insure a continuance of the existing practice it was necessary for Congress to enumerate these incidental services directly connected with transportation and to provide that land grant rates should in the future as in the past apply to the payment for these incidental services, whether embodied in a single rate covering them as well as actual transportation, or whether separately fixed, it is unnecessary to consider. Congress did so and we are not challenging the propriety of their inclusion within the duty to transport as necessary and incidental thereto. The mere enumeration evidences the existence of numerous services connected with transportation itself, a part of which might be performed either by the carrier or the department, but all of which are necessary or incident to transportation and connected therewith.

The limitation of land grant rates to services so connected with transportation as to be necessary or incidental to transportation itself also comports with the context. This provision of the act applies in terms only to those railroads constructed on condition that the mails should be transported over their roads at such price as Congress should by law direct. It therefore rests wholly upon the contractual obligation to transport. It applies to those roads bound by such contractual obligation and to no others. It was enacted solely in the enforcement of such contracts. It employs the phraseology of the land grant acts, themselves. There is nothing to indicate that Congress intended to enlarge such contractual obligation even if it had the power to do so.

Finally, Congress is never to be presumed to have intended to exceed its constitutional authority or to enact a law giving rise to grave constitutional questions. Only when no other interpretation is possible is such a construction permissible. Congress is always supposed to be cognizant of its own constitutional limitations. Bearing in mind these limitations and reading this act in the light of the long continued administrative interpretation

of that part of the act of 1876, of which it is a reenactment, and in light of the context, it is clear that Congress intended to make 80 per cent. of standard compensation apply to all those services fairly within land grant obligations and to no others. The statute is not only fairly susceptible of this interpretation, but it is the more rational of the two.

VIII.

For the furnishing of distributing space Appellant is entitled to that proportion of the compensation for Railway Post Office car service at the rates fixed by the Commission, which the distributing space in such cars is of the total space therein, however the Act of 1916 be construed.

As we have said, Congress did not fix specific rates for distributing space, neither did it fix the amount of space in railway post office cars to be devoted to distributing facilities or prescribe the nature and extent of the fixtures therein, nor did it empower the Commission so to do. All these matters, as well as the extent of other services and facilities to be furnished, were delegated exclusively to the Postmaster General. The Act fixed a single rate to apply to both services performed in such cars, leaving it to the Postmaster General to determine how much of the space therein should be devoted to the one service or the other. In fixing its scale of space rates the Commission followed the statutory method and established rates applicable to the entire service in railway post office cars, leaving to the Postmaster General the determination of the amount of space in such cars to be devoted to transportation and

distribution respectively, and over which the Commission was given no control. It followed the same course as to other classes of services, fixing rates conforming to the classes and units of service prescribed in the Act, which were expressed in terms of railway car service or space.

In the opinion of the Court of Claims (Record, p. 21) comment is made upon the fact that the rate for each of the several units of railway post office car service is fixed as an entirety and that the rates fixed by the Commission follow the statutory method and do not itemize the values of the different portions of the car whether used for one purpose or another. If by this it is meant to suggest that, because the rate for a railway post office car is fixed as an entirety, the appellant or any other land grant carrier is deprived of its right to reasonable compensation for so much of the service performed in such car as falls outside its land grant obligation and must accept 80 per cent. thereof, it is respectfully submitted that the suggestion is wholly untenable. The constitutional right to fair and reasonable compensation cannot be thus lightly destroyed.

It is also suggested in the opinion of the Court of Claims that the appellant might have refused to perform railway post office car service under this Act and scheme of pay. In this again the Court of Claims erred. The performance of such service was made compulsory on all railroads. The appellant had no option and waived no rights by performance (*Chicago & Northwestern Ry. Co. v. U. S.*, *supra*, pp. 686-7). That Congress had the right to make it compulsory it is believed admits of no doubt. Fines and penalties are imposed for disobedience and the service was manifestly performed under duress of law. It was appellant's duty to perform the service. It is the correlative duty of the Government to pay reasonable compensation for such service except as covered by land grant obligations. The Act itself, recognizing this duty, provides that reasonable and just compensation shall be made

for all the service required to be performed by the Act¹. If the furnishing of distributing facilities is not within the land grant, the appellant clearly has failed to receive for such services reasonable and just compensation either as defined in the Act itself or otherwise, since it has been paid for all service performed in railway post office cars but 80 per centum of the rates prescribed as just and reasonable for the use of such car as an entirety.

The fact that both the statutory scale and the Commission scale, which followed it in fixing rates applicable to the units of service prescribed by the act itself, named rates applicable to the entire service performed in railway post office car service affords no legal or practical obstacle to the payment of just and reasonable compensation for such service. Indeed, looking at the Act as a whole and at the basis upon which the rates established thereunder were fixed as well, it seems plain that the appellant is entitled to recover that proportion of the compensation accruing from the use of such cars as a whole at the rates fixed, which the distribution space is of the total space therein, and that any attempt to fix specific rates for distributing service would have been inconsistent with the scheme and purpose of the Act and would have interfered with its practical administration.

In changing from a voluntary to a compulsory system of service, it was necessary for Congress first to prescribe the service required. This it did in terms of railway car service or space, both as to railway post office car service and all other classes of service. With respect to railway post office car service, it made it the duty of the carriers to furnish the necessary distributing space and facilities as well as to transport the mails but did not designate the extent to which such space or facilities should be provided in any particular type of equipment. It was necessary, second, for it either to determine the extent of service to

¹Appendix p. vi, ¶ 31.

be performed or to fix the means for such determination. This it did by leaving the same to the Postmaster General, including the power to determine the extent and nature of the distributing space and facilities to be provided in railway post office cars. It was also necessary for Congress to provide for the payment of reasonable compensation for all of the services prescribed. In meeting this requirement it first declared that just and reasonable compensation should be paid for all services performed under the Act. Having done this, the Act then fixed a temporary scale of space rates applicable to the several classes and units of car service prescribed under the Act, graduated according to space, and to apply upon such routes as might be temporarily placed upon the space basis, pending the determination by the Commission as to the basis and rates of pay which it was empowered ultimately to fix. No control over the service, over the construction or specifications for railway post office cars, over the amount of distribution space, or over character, or extent of distributing facilities therein was delegated to the Commission. The Act thus clearly marks out those matters prescribed by the Act itself, and those matters left within the control of the Postmaster General and the Commission respectively. What the Act itself prescribed could not, of course, be altered by either except as power to change was expressly delegated. All matters of service and the extent of facilities to be provided, whether in railway post office cars or elsewhere, including the right to require railway companies to furnish space in stations for the distribution of registered mail as well as space in railway post office cars for distribution on trains, and the extent of space to be provided for either were delegated exclusively to the Postmaster General. The Commission's sole function was to determine rates to be paid for the services prescribed in the Act and to the extent authorized by the Postmaster General.

Neither was the Commission given any authority to fix rates for land grant routes as such. Its duty was to fix reasonable rates for all carriers, whether performing services under land grant or otherwise. For land grant services the Act itself fixed the basis of pay at 80 per cent. of that fixed under the Act for others. The Commission completed its duty when it established reasonable rates for all carriers, declared by it to be just and reasonable for all mail routes, including those of the appellant. With this done the application of the 80 per centum basis to so much of the services embraced in such rates as were covered by land grant obligations became automatic. It is true, as stated by the Court of Claims, that the Commission interpreted the 80 per cent. basis as applicable to all services covered by the Act, including the furnishing of distribution space and facilities. The Commission, however, having no authority to change the basis for payment of land grant carriers, its declaration represented merely its own view of the law not binding upon either the carriers, or the Postmaster General. If it had held to the contrary, the Postmaster General could have refused payment of more than 80 per cent. of the compensation accruing on account of the furnishing of distributing facilities, asserting that the Act itself provided that that was all that land grant carriers should receive. In any litigation which might ensue it would be the duty of the Court to construe the Act and the Commission's determination of the legal question involved would not have been conclusive upon either the courts or the parties. The appellant protested the Commission's interpretation as well as payment on the 80 per cent. basis, although the service being compulsory, no protest was necessary (*Chicago & Northwestern Ry. Company v. U. S., supra*).

Assuming, therefore, that performance of these services is not within appellant's land grant, the sole remaining question is upon what basis should it receive compensation therefor? Clearly, as we think, upon the basis of

that proportion of the compensation accruing under the Act, for railway post office car service, as a whole, which the proportion of distribution space in such cars is of the total space.

To have fixed specific rates on a space basis for distribution space, without at the same time prescribing the amount of distribution space to be provided, would have been inappropriate and inconsistent with the Act and the division of powers therein contained. To have fixed a uniform rate for distribution space in all post office cars or apartments of a given size it would have to be assumed that the arrangement of all such cars was uniform, and the division of space between distribution and transportation space in all was the same. Otherwise, the rate would have been too high for some and too low for others, and would have represented an arbitrary figure inconsistent with the theory of adjusting pay to the space used. The carriers' mail equipment is the result of 40 years' growth, and any assumption of uniformity upon the part of Congress would have been wholly untenable. Indeed, the presumption is quite to the contrary. Furthermore, the Postmaster General may at any time revise existing standard specifications and increase or reduce the amount of space to be occupied with distributing facilities. He may at any time arrange with a railroad for the construction or alteration of a car in which more or less space is so occupied. A fixed rate would give rise to confusion in such cases and would have infringed upon the prompt, flexible and orderly exercise by the Postmaster General of the control over such equipment, vested exclusively in him, and in adjusting service to requirements. In any event, no effort was made to name specific rates for uniform application to all distribution space in each of the three classes of railway post office cars defined in the Act, or for the different varieties of such cars then in use, or which might afterwards be provided. A single rate was named for the entire space in the car, the disposition of which was left to be determined by the Postmaster General, as were all other matter of service and facilities.

Nor was it necessary to undertake a division of the pay accruing from such cars in the fixing of a scale of reasonable rates in order to provide reasonable compensation for so much thereof as was devoted to distribution. The scheme provided is a space basis of pay. The argument pressed both upon Congress and the Commission in favor of the space basis was that the weight of the load carried in passenger train cars, whether mail, baggage, express or passengers, is so negligible as compared with the weight of the equipment itself as not to be a factor in determining the cost of the service, which can be most accurately determined upon the basis of the space devoted to the several classes of service performed. The rates fixed represent a scheme of space rates designed to compensate the carrier upon the basis of cost plus a fair return and in which the value of the service to the user as a separate factor is wholly ignored. Under such a scheme the rate applicable to the operation of a full 60 foot car, is based upon the assumed cost of transporting the passenger train space represented by such car and that proportion of the compensation earned on such car, which is applicable to the furnishing of distributing facilities, is directly represented by the proportion which the space occupied by such distributing facilities bears to the entire space in the car. No other conclusion is logically possible.

The rates fixed are at so much per mile for each of the several units. Total compensation for any unit of service on any route is determined by multiplying the rate by the miles run. The petition alleges that the rates fixed by the Commission were

"based upon statistical ascertainment of the cost of transporting the mails and of performing the additional services hereinbefore described, as determined by the proportion which the space furnished and provided for said service bore to the total space involved in passenger train operation and that the reasonable compensation thereby fixed for each of the several classes of service required to be per-

formed by the act of July 28, 1916 was measured and determined solely by the occupied and complementary space required to be furnished in connection therewith and graduated according to the amount of space authorized to be furnished in accordance with said act" (Rec. p. 12).

Indeed, reference to the opinion of the Commission will show that the cost unit employed by it in the determination of the rates prescribed was not the cost per mile but the cost per car-foot mile, including within the car-foot miles assigned to the various classes and units of service prescribed in the act not only the occupied and authorized space but such empty space as was required to be hauled in connection therewith, or its proportion of such empty space, as in the case of mixed cars which were used for more than one class of traffic.* The rates fixed by the Commission for a full 60 foot railway post office car therefore were fixed upon the theory that the cost per car foot mile of every foot of space in such car was the same and that the rate established for such car represented what may be termed the aggregate cost of furnishing and hauling 60 feet of space in a car of such description and type. Indeed, the whole theory of the space scheme of pay is that the value of each foot of space in a given car, or part thereof, prescribed for use in the act is the same.† The

*See discussion of cost and review of statistical data (*Railway Mail Pay, supra*, pp. 26-44) and the numerous tables therein contained in which the space, devoted to passenger, mail and express and to the several classes of railway car service, performed in connection with the mails, is set forth in terms of car foot miles and the cost allocated on that basis.

†The statistical tables referred to in the preceding footnote set forth, in terms of *car-foot miles*, not only the amount of authorized and used space to be paid for at the rates fixed, but also the amount of unauthorized or dead space in each class of service necessarily operated in connection therewith and to be taken into account in fixing the rate for each class. The proportion of such car-foot miles of such complementary space necessarily varies among the classes of service and accounts primarily for the fact that the rate for a 30 foot car is in excess of one-half of that provided for a full 60 foot car. As to each class of service, however, the necessary theory of the statistical study made and of the rates based thereon is that the cost and value of each car-foot mile of service in a car, or space unit of a given size, is the same, irrespective of the nature or extent of its use, whether completely filled or only partially so, and whether devoted to transportation or distribution.

petition alleges that the distributing space in a railway post office car is physically separate from the space in such car devoted to transportation of the mails, is susceptible of actual measurement and that none of such space was required or necessary for the transportation of the mails but was furnished solely for the purpose of permitting the department to utilize the time in transit for making distribution (Petition, Rec. pp. 9 & 10). It is therefore plain that, of the total compensation received for the use of each railway post office car operating over appellant's land grant routes, the amount thereof accruing from the furnishing of distributing facilities is that proportion of the total compensation for such car at the rates fixed, which the distributing space is of the total space in such cars multiplied by the distance hauled. The petition states as to each of the several classes of railway post office cars operated over its land grant routes the total miles of service performed, and the proportion thereof represented by distributing space (Petition, Rec. p. 9). The amount sued for represents the difference between the full proportion of the pay accruing on said cars attributable to distributing space thus mathematically ascertained and 80 per cent. already received (Petition, Rec. pp. 13 & 14).

The claim as presented thus comports with the scheme of pay established and is consistent with the statute, its purposes, and its orderly administration.

Appellant's claim likewise conforms to the decision of this Court in *Southern Pacific Company v. United States*, 48 Ct. Cls. 227, 237 U. S. 202. In that case the carrier transported government property and troops between San Francisco and Portland, Oregon, via Roseville, California. Its line between Roseville and Portland was impressed with a land grant obligation to perform such service free. The rates named in its published tariffs for passenger and freight transportation between San Francisco and Portland were stated as through rates, covering the entire service and were less than the sums of the local rates to and

from Roseville. The sole question was how to determine the carrier's compensation for the non-land grant service involved in this through haul for which a single rate was named. The carrier claimed that it should be paid its full local rate between San Francisco and Roseville, presumably representing a fair charge for such service, and that the value of the land grant service between Roseville and Portland was represented by the difference between the through rate and such local. The government contended and both this Court and the Court of Claims held that, since a single rate was named for the entire service, the compensation attributable to the land grant and non-land grant services, respectively, should be determined on a mileage basis; and that for the non-land grant service between San Francisco and Roseville the carrier was entitled only to that proportion of the rate, covering both land grant and non-land grant mileage, which the latter was of both combined. In that case, as in this, the service performed by the carrier was in part subject to a land grant obligation and in part not, but a single rate was named for both combined. Under these circumstances the rate was divided in the proportion in which the volume of physical service subject to the land grant obligation bore to the total physical service performed. In that case the proportion ascribed to land grant service was the proportion which the miles of freight, or passenger, transportation over the land grant mileage was of the total miles of freight, or passenger, transportation performed and covered by the single rate fixed. In this case it is the proportion which the car foot miles of distributing space was of the total car foot miles of railway post office car space of which they form a part.

For a full statement of the facts in the foregoing case the opinion of the Court of Claims (48 Ct. Cls. 227) should be consulted. By reference thereto as well as to 8 Comp. Dec. 598 (607) cited therein, it appears that the practice

thus sustained had been of long standing, and had been approved in numerous prior published decisions of the Comptroller of the Treasury. There was thus in effect, at the time of the passage of the act of 1916, a recognized rule of long standing under which a freight or passenger rate, covering both land and non-land grant services was divided on the very simple, natural and equitable basis of the relative physical service performed, which rule had received judicial sanction in the foregoing case, affirmed by this Court more than a year before the act was passed. There is no difference in principle between division of a through rate covering service over land grant and non-grant mileage, and the division of a rate covering land grant and non-land grant services in the same car on the basis of the relative physical service performed. Indeed, it is well known that cost of freight or passenger transportation per mile over one part of a through haul may greatly exceed that over another. Manifestly, however, the cost of transporting a foot of transportation space and a foot of distribution space in a railway post office car over the same mileage in the same car is the same.

A railroad company by commingling non-land grant and land grant services in a single rate cannot defeat the rights of the Government under land grant contracts. Neither may the Government by commingling non-land grant and land grant services in a rate fixed by it deprive a railroad company of reasonable compensation for the non-land grant service. It would be quite as consistent for the Government to contend that, because the Interstate Commerce Commission fixes a through freight rate between points involving both land grant and non-land grant mileage without dividing the same as between the two, a railroad company, required by law to accept 50 per cent. of commercial freight rates for land grant service, is entitled to but 50 per cent. of the entire through rate, thus fixed to cover both land grant and non-land grant

service, as to say that, because it has fixed a single rate to cover both land grant and non-land grant services in a railway post office car, the extent of each of which is to be determined exclusively by the Postmaster General, the Railway Company may receive but 80 per centum of the single rate thus named. Since the fixing of these rates was in the hands of the Government, if they are not susceptible of division it would seem that the carrier would be entitled to 100 per cent. of the single rate thus named. Otherwise the Government would be in the position of taking advantage of its own wrong. Both rates and service are, however, susceptible of accurate division on the basis of the relative amounts of space furnished and hauled. The claim presented is supported by every consideration of common sense, by the very nature of the scheme of space rates established in the Act, and continued by the Commission and by the authority of the foregoing case.

Whatever interpretation be placed upon that part of the Act of 1916 fixing land grant rates the carrier is clearly entitled to the compensation claimed, if it be held that the furnishing of distributing space was not within its land grant obligation. First, if it be held that the land grant rate provisions of the Act of 1916 applied only to compensation for transportation, then necessarily the compensation accruing to appellant over its land grant routes under the space scheme of rates in force is to be measured and determined in the manner above described.

Second, if it be held that Congress intended by the Act of 1916 to apply the 80 per cent. basis to distributing space but was without power to do so, then so much of the Act is void, and the rest of the Act remains in full force and effect. Among the provisions thus remaining is the one that "fair and reasonable compensation" shall be made for all the service prescribed in the act; and the appellant is thus entitled, under the act, to that proportion of the reasonable compensation accruing under the space system of pay which is earned through the furnishing of

distributing space, to be ascertained in the manner described.

Third, if it be held that by reason of a void and ineffectual attempt upon the part of Congress to apply the 80 per cent. basis to compensation to be received for the furnishing of distributing space, Congress made no provision for just and reasonable compensation therefor, then appellant is entitled to recover in the Court of Claims on implied contract the reasonable value of services involuntarily performed under the requirement of an act of Congress and at the instance of a public officer authorized to compel such performance. (*United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *United States v. Lynah*, 188 U. S. 445; *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59; *United States v. Berdan Fire Arms Co.*, 156 U. S. 552; *Freund v. U. S.*, *supra*). That such services were reasonably worth the amount claimed, determined in the manner stated, is specifically alleged in the petition (Petition, Rec. p. 14).

It is respectfully submitted that the judgment of the Court of Claims dismissing appellant's petition should be reversed.

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